Office
FILED
JUL 16 1983
STEVAS

No. 82-2050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, *et al.*,

Petitioners,

v.

H. ANITA LINCOLN,

Respondent.

BRIEF OF RESPONDENT IN RESPONSE TO PETITIONER'S "PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT"

JOHN J. SULLIVAN
GILBERT L. STACY
Attorneys for Respondent

Please Address All
Correspondence to:

JOHN J. SULLIVAN
208 East Bay Street
Savannah, Georgia 31401
(912) 233-0213

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

I

QUESTION PRESENTED FOR REVIEW

Respondent takes issue with Petitioner's characterization of the Question Presented for Review as a judicial restructuring of a case to affix liability against a State Agency which prevented the State Agency from defending a claim of which it had neither notice nor an opportunity to present a defense.

The correct questions should be:

1. Is a Title VII Defendant denied "due process" notice and a right to defend, where in the same action, a Plaintiff pursues a parallel § 1981 claim, electing not to sue all potential §1981 Defendants whose activities may cause the Title VII Defendant's liability; and the trial court determines the Title VII Defendant's liability because of the activities of agents other than the named § 1981 Defendants?

2. Can a Title VII Defendant who stipulated to the timeliness of an EEOC charge during the trial of a case, later attempt to show that the filing of the EEOC charge was untimely, when the record

is silent as to the actual date of the filing?

II

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i, ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	4
REASONS FOR DENYING THE WRIT	8
APPENDIX	12

III

TABLE OF AUTHORITIES

Page

Cases

McDonough Marine Services, Inc. v. M/V Royal Street, 608 F. 2d. 203 (5th Cir. 1979) 9

United States v. Payne, 474 F. 2d 603 (10th Cir. 1973 8

Statutes

42 U. S. C. § 2000e, et seq. (Title VII) 4,5,6,7,10

42 U. S. C. § 1981 4,5,9,10

IV

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Const., Amend. V:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U. S. Const., Amend. VII:

> "In Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

42 U. S. C. § 2000e - 2:

"(a) It shall be an unlawful employment practice for an employer -

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin;..."

42 U. S. C. § 2000e - 5:

"(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred...

* * *

(g) If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the Court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action

as may be appropriate, which may include but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate..."

V

STATEMENT OF THE CASE

The case was brought before the trial court pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., against the BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA (BOARD), and the Civil Rights Act of 1866, 42 U.S.C. § 1981, against EVANNEL R. TERRELL and CLYDE W. HALL. Respondent was employed as a Home Economics instructor at Savannah State College (SSC), an institution governed by the BOARD. Respondent is a white female. SSC is a predominately and historically Black learning institution. Dr. Lincoln alleged that she had been the victim of racially motivated attacks on her fitness as an instructor, directly or indirectly carried out by the individual Defendants HALL and TERRELL in violation of §1981. Plaintiff also alleged the Defendant BOARD was liable under Title VII for her non-renewal or discharge, by its agents.

The trial of Plaintiff's claims was held on November 3 through 4, 1980. The court utilized the jury in an advisory capacity to determine the question of Title VII liability. The § 1981 claim against HALL and TERRELL was tried by the jury. The jury

returned a verdict for the individual Defendants in the §1981 action; however, by advisory verdict, the jury found in favor of Dr. Lincoln with regards to the Title VII claim against the BOARD.

On December 17, 1980, the court made findings of fact and conclusions of law which held Title VII liability against the BOARD. In that order, the court awarded two (2) years full back pay, court costs, and attorney's fees. The court, in awarding the full two (2) years back pay, noted that Plaintiff had made unsuccessful attempts to secure employment, but was unable to because of the circumstances surrounding her departure from SSC and her age (60).

During the trial of the case, (Transcript, Page 20) the BOARD stipulated that the requisite EEOC charge was timely filed by Dr. Lincoln and that she was timely in bringing suit. Neither Plaintiff nor BOARD introduced evidence relating to when the EEOC charge was filed. References by the Petitioner to any specific filing date is improper because it relates to matters outside of the record.

The trial court affixed the Title VII liability against the BOARD largely because of the acts of Dr. Prince Jackson, who was then the President of SSC. The court concluded that President Jackson was responsible for her constructive discharge. Dr. Jackson was not a named party in the §1981 action. Despite Petitioner's claims to the contrary, President Jackson's role in Dr. Lincoln's dilemna was known prior to trial by the BOARD.

Extensive discovery was conducted prior to the trial and on May 9, 1980, President Jackson's deposition was taken. (see appendix) Furthermore, in the Proposed Pre-Trial Order filed by both parties on September 26, 1980, which was made an order of the court on October 1, 1980, President Jackson's name appeared on the Plaintiff's list of forty witnesses as an adverse witness, the only adverse witness listed by the Plaintiff. Although Plaintiff's original complaint accused the BOARD of discrimination "through its agents, Defendants CLYDE W. HALL, EVANEL R. TERRELL and DIANA WAGNER" (subsequently dismissed by Plaintiff), it also alleged generally that

she was discharged "so as to provide a vacancy that was filled with a Black Female" and "because she was white and for reasons for which Blacks are not terminated". These allegations directly relating to the termination itself did not mention the named Defendants as agents or otherwise. Furthermore, the amended complaint deleted the Board from the fist quoted allegation, which then included only the individual Defendants. At this point, the Board's liability could only be predicated upon the more general allegations that followed. Additionally, Plaintiff's proposed jury charge contained in the Pre-Trial Order of October 1, 1980, relating to the Title VII claim referred to the Board "acting through its employees at Savannah State College" without specifying the individual Defendants as the employees in question. (see appendix)

VI

REASONS FOR DENYING THE WRIT

First and foremost, the Court should deny Petitioner the writ, because it is now attempting for the first time to assert defenses by the introduction of evidence that was not presented to the trial court. The petition at page 15, presents excerpts from Respondent's EEOC charge which was never tendered, much less introduced into evidence and therefore is not a part of the record. Furthermore, on page 16 of its petition, it asserts that Respondent made an untimely filing of her EEOC charge. This is in contradiction to the trial conduct of Petitioner wherein it stipulated to the timeliness of Respondent's EEOC charge and her bringing of the action within the requisite "right to sue' period. (Trial transcript, page 20). Where a party assents to a stipulation, it may be admitted as conclusive proof as to the contents of the stipulation. United States v. Payne, 474 F.2d 603 (10th Cir. 1973).

The decision by Petitioner to stipulate to the timeliness of the EEOC charge is a matter peculiar to the case at hand, and

Petitioner's trial strategy will affect few others than the litigants in this case.

Furthermore, both the trial court and appellate court were correct in holding that the exclusion of President Jackson in the § 1981 claim did not preclude a finding that the Board was culpable for his actions. Petitioner's protestations that liability based on President Jackson's conduct was violative of its "due process" right to notice does not mesh with the facts of the case or law. The law of respondeat superior does not require that a Plaintiff also sue the agent whose conduct is the underlying reason for its employer's liability. McDonough Marine Services, Inc. v. M/V Royal Street,608 F. 2d 203 (5th Cir. 1979). Just as Petitioner had reasons for stipulating to the timeliness of the EEOC charge, Respondent had strategic reasons for not naming President Jackson as a party.

Despite Petitioner's representations, Respondent never continuously maintained that the Board was liable because of the exclusive conduct of the named § 1981 Defendants. The

petition at page 9 has misstated by omission the facts of the case. The quoted material on that page of paragraph 6 of the Original Complaint does state that the Board acted through the §1981 Defendants. What is omitted however, is the amended complaint which recasts paragraph 6, striking all reference to the Title VII Defendant and deals strictly with § 1981 liability against the Defendants. The Title VII claim is then presented in general terms without naming any employees.

Petitioner had numerous clues that should have alarmed it that its liability could hinge on the conduct of other individuals, including President Jackson. As previously mentioned, President Jackson was listed months before trial as an adverse witness, the only adverse witness out of forty witnesses listed by her. Respondent has already mentioned other factors in her Statement of the Case, which should have alerted Petitioner that its Title VII liability could be based upon the conduct of other employees.

Because of the peculiar facts of this case, there are no important legal issues

to be resolved by the Court. Respondent believes that the decision of the appellate court was a correct one and is not in conflict with decisions of other circuits and therefore not worthy of review by this Court. Respondent requests that the Writ be denied.

John J. Sullivan

Gilbert L. Stacy

APPENDIX

Appendix

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

H. ANITA LINCOLN	]	
Plaintiff	]	
VS	]	CIVIL ACTION NO.
	]	CV 479-370
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, and CLYDE W. HALL, EVANEL R. TERRELL and DIANA WAGNER	]	
Defendants	]	

AMENDMENT TO COMPLAINT

NOW COMES H. ANITA LINCOLN, Plaintiff in the above-styled action and amends her complaint by deleting previous paragraphs 2,6,7 and 8, and recasting them as follows:

2. This is a proceeding for a declaratory judgment as to Plaintiff's rights and for a permanent injunction enjoining Defendant, BOARD OF REGENTS, from maintaining a policy or practice of discriminating against Plaintiff because of race or color with respect to its failure to rehire her for the academic year 1978-1979.

6. Defendants CLYDE W. HALL, EVANEL R. TERRELL and DIANA WAGNER, with intent and purpose, engaged in activities to terminate the Plaintiff from her employment at Savannah State College and prevented her rehiring because of Plaintiff's race.

7. That Plaintiff was not rehired to her position as instructor so as to provide a vacancy that was filled with a Black Female.

8. Plaintiff was not rehired because she was white, and for reasons for which Blacks are not terminated.

Respectfully submitted,

_____
John J. Sullivan

_____
Gilbert L. Stacy
Attorneys for Plaintiff

EXCERPT OF PRE-TRIAL ORDER
(Record, page 50) of October 1, 1980

Plaintiff's Witnesses

(1) Plaintiff will have the following witnesses present at trial.

H. Anita Lincoln

William Moore, U. S. Attorney

Vivian Perry

Dr. Prince Jackson (as an adverse witness)

(2) Plaintiff may have the following witnesses present at trial.

Corrie Lee Heyward

Webayehu Asseged

Alvin Cook

Gloria P. Hall

Deborah Pelote Allen

Martha Corley

Hayward S. Anderson

Dr. Thomas Byers

Isaiah McIver

Sister M. Julie Maggioni

Althea V. Morton

Steven R. Smith

Kenneth E. Taylor

Wilma Adams

James Etta Bush

Huddie Culbreth
Marcia A. Cutter
Brenda Duhart
Eloise Formey
Maxine Hazel
Harry Hezekiah
Cheryl E. Jenkins
Annie E. Martin
Annie F. Phillips
Regina Poaches
Millicent Relaford
Cheryl Robinson
Netha Steplight
Gloria Sapp
Pearl Smalls
Sharon Thomas
Winifred Trim
Gloria S. Underwood
Diann Walker
Mary T. Waters
Judy Wilder

PLAINTIFF'S PROPOSED TITLE VII JURY CHARGE
CONTAINED IN THE PRE-TRIAL ORDER OF OCT. 1, 1980
(Record, Pages 67-68)

The Plaintiff, Miss Lincoln, contends that the BOARD OF REGENTS, acting through its employees at Savannah State College violated a federal law relating to her employment by failing to rehire her for the academic year 1978 - 1979. The BOARD OF REGENTS contends that it violated no law in rehiring her for the academic year. Unless this federal law was violated the motives of the BOARD OF REGENTS in failing to rehire her are legally immaterial. In order to determine whether or not the law was violated you must answer the following questions "Yes":

Was Miss Lincoln in a racial minority at Savannah State College?

Was she qualified for her position?

Despite her qualifications, was she rejected?

Was someone else hired in her place or position not in her race? 1/

If you answer "No" to any or all of the questions, you must return a verdict in favor of Defendant BOARD OF REGENTS. If "Yes" is the answer to the above four questions, your decision as to whether or not her rights were violated must not stop here. The law requires that you then consider whether

the preponderance of evidence shows whether or not the BOARD OF REGENTS acting through its employees [2/] at Savannah State College had nondiscrimintory reasons for failing to rehire her. If your answer is "No", you must decide whether or not the preponderance of evidence shows that race was a significant or determining factor in her failure to be rehired. If race was a significant or determining factor in her failure to be rehired. If race was a significant or determining factor in the employees' decision, then you shall return a verdict in Plaintiff's favor. If the BOARD OF REGENTS, acting through its employees at Savannah State College had nondiscriminatory reasons for failing to rehire her you must decide whether or not the preponderance of evidence shows that its reasons for failing to rehire her were a ruse or sham for disquising a racially discriminatory decision. If you determine that the justification was a sham or ruse for disquising a racially discriminatory decision and that the decision was a significant or determining factor in failing to rehire her, then you shall return a verdict in her favor

against the BOARD OF REGENTS. If, on the other hand, you decide its reasons were not a sham or ruse, then you should return a verdict for the Defendant BOARD OF REGENTS.

If a verdict is rendered against the BOARD OF REGENTS, the Court in this instance will only award the appropriate damages.[3/]

1/ Whiting v. Jackson State University, 22 FEP Cases 1297 (5th Cir. 1980)

2/ Addison v. Certain-Teed Products Corporation, CV 477-98 (SD Ga. 20 Nov., 1979)

3/ Whiting, Supra.

EXCERPT FROM BILL OF COSTS SHOWING
DEPOSITION OF DR. PRINCE JACKSON
(Record, Page 195)

Date		Hours
05/09/80	Deposition of Dr. Jackson and consultation with client in preparation for deposition.	4:00

CERTIFICATE OF SERVICE

I certify that I have this date served the Petitioner with the foregoing Brief of Respondent by placing three printed copies thereof in the United States mail with proper first class postage affixed thereto and addressed to Alfred L. Evans, Jr., Senior Assistant, Attorney General, 132 State Judicial Building, Atlanta, Georgia 30334.

This 15th day of July, 1983.

SULLIVAN & STACY

BY: Gilbert L. Stacy
GILBERT L. STACY

SULLIVAN & STACY
208 East Bay Street
Savannah, Georgia
31401

(912) 233-0213